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NO. 82-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., LARRY C. FLYNT, LFP, INC. and L.F.P., INC.

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Under the particular facts of this case, is there a sufficient relationship among the parties, the forum, and the litigation in order to justify, under the Due Process Clause, the exercise of personal jurisdiction over these nonresident defendants.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents Hustler Magazine, Inc., Larry C. Flynt, LFP Inc., and L.F.P. Inc., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the First Circuit Court of Appeals.[1]

Statement of the Case

Petitioner Kathy Keeton, a resident of New York, brought suit in Ohio in May 1977 for invasion of privacy and libel against the same defendants as in the present action. She was joined as plaintiff in that action by Robert C. Guccione, the publisher of *Penthouse* magazine, a rival magazine to *Hustler*. Kathy Keeton and Robert C. Guccione are common-law husband and wife. Keeton is associate publisher and senior vice-president of *Penthouse* magazine and also is the editor of another Guccione-owned magazine known as *Omni*.

The lawsuit was instituted in Ohio because the defendants were located there at that time. Ohio is the state of incorporation for the corporate defendants. The principal place of business for the corporate defendants was Columbus, Ohio. The individual defendant, Larry Flynt, resided in Columbus, Ohio, at the time.

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[1] The following statement is made pursuant to Supreme Court Rule 28.1. The parent company of Hustler Magazine, Inc. is L.F.P., Inc. LFZ Ltd. is a subsidiary of L.F.P., Inc. Flynt Distributing Company, Inc., Flynt Subscription Co., Inc., Flynt Domestic International Sales Corporation, Gentleman's Companion Magazine, Inc., Sex Play Magazine, Inc., and MCA Advertising Co. are corporations affiliated with Hustler Magazine, Inc.

Keeton's Ohio lawsuit concerned the May 1976 issue of *Hustler* magazine. The lawsuit was brought more than one year after the publication of that issue of *Hustler*, so the Ohio trial court in May 1978 dismissed both Guccione's and Keeton's libel claims based on the Ohio statute of limitations of one year. No appeal was filed by either Keeton or Guccione concerning the dismissal of their libel count. Keeton's invasion of privacy claim subsequently was dismissed as barred by the New York statute of limitations, which the Ohio Court considered to be migratory. Unlike the situation involving dismissal of their libel claim, Keeton and Guccione appealed the dismissal of their privacy claims to the Franklin County (Ohio) Court of Appeals. On September 30, 1980, the appellate court affirmed the decision of the trial court. Ms. Keeton did not appeal the case to the Ohio Supreme Court.

By the time Keeton lost her appeal in Ohio, the statute of limitations in every jurisdiction in the country for libel had expired, except for the statute of limitations in New Hampshire, which was six years. The plaintiff filed a complaint in the United States District Court for the District of New Hampshire containing a libel count based on the same publication she alleged was defamatory in her Ohio suit. She later amended her complaint to add an additional count in libel for the September 1975 issue of *Hustler*. The defendants filed a motion to dismiss on the grounds, *inter alia*, that the Court did not have personal jurisdiction over them. The District Court granted the motion based on its lack of personal jurisdiction over the defendants. The District Court found that New Hampshire had only an attenuated relationship with the parties and events in the case so the state had no interest in this litigation. The Court held that the Due Process Clause of the Fourteenth Amendment prevented New Hampshire from exercising jurisdiction over the defendants.

The First Circuit Court of Appeals affirmed the District Court's decision on June 16, 1982. The Court of Appeals analyzed the relationship of the parties and the litigation to the forum, and held that due process would not allow New Hampshire to have jurisdiction over the defendants. The petitioner seeks to have the decision of the Court of Appeals reviewed on the grounds that the Court applied the wrong legal standard to

the facts of the case. The respondents submit that this case does not deserve review by this Court because the Court below applied the correct legal standard to the particular facts of this case.

Summary of the Argument

The decision below is in accordance with the legal standards established by this Court concerning the limitations the Due Process Clause of the Fourteenth Amendment places on a state's exercise of personal jurisdiction. The decision below applied the proper legal standard to the particular facts of the case. This case does not involve a federal question of great public importance. There is no question of law at issue that justifies the granting of a writ of certiorari.

REASONS FOR DENYING THE WRIT

1. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD TO THE PARTICULAR FACTS OF THIS CASE AND HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO REQUIRE THIS COURT TO EXERCISE ITS POWER OF SUPERVISION.

The petitioner claims that the Court of Appeals applied an incorrect legal standard and based its decision solely and merely on the fact that the plaintiff lacks contacts with the forum. Furthermore, the petitioner asserts that no inquiry beyond a defendant's contacts with the forum is permitted. Such an analysis misconstrues the rationale of the decision below and also misstates the law. Contrary to the petitioner's assertions, the Court of Appeals applied the correct legal standard and considered all of the criteria established by this Court under the "fairness" test. The result below is based on the particular facts of this case and does not merit review by this Court.

This Court has held consistently that the basic limitation imposed by the Due Process Clause on personal jurisdiction is "reasonableness" and "fairness", i.e., is it "reasonable" to

require the defendant to defend this lawsuit in the forum under the circumstances of a particular case. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The standard of "reasonableness" recently was given content by this Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980):

> "Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum state's interests in adjudicating the dispute, *see McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); the plaintiff's interests in obtaining convenient and effective relief, *see Kulko v. California Superior Court*, [436 U.S. 84, 92 (1978)], at least when that interest is not adequately protected by the plaintiff's power to choose the forum, *cf. Shaffer v. Heitner*, 433 U.S. 186, 211 n. 37 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and the shared interest of the several states in furthering fundamental social policies, *see Kulko v. California Superior Court*, supra at 93."

As the above-language shows, the question of whether due process prohibits the state from exercising jurisdiction over a defendant involves an inquiry into more than the defendant's contacts with the forum. This approach was accepted and followed by the Court of Appeals in its decision. The Court considered the respondents' insignificant contacts with the forum, New Hampshire's lack of interest in the litigation, the fact that the petitioner could have chosen a more appropriate forum if she had not slept on her rights, the policy of having an efficient resolution of alleged multi-state defamation, and the fact that the allegedly defamatory material was not aimed exclusively at New Hampshire. Based on the particular facts of this case, the Court of Appeals held that it would be unfair to allow the plaintiff to sue these defendants in New Hampshire. Other courts have come to similar conclusions in libel cases. *See, e.g., Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966); *Church of Scientology v. Adams*, 584 F.2d 893 (9th Cir. 1975).

Any reference the Court of Appeals made to the petitioner's lack of contacts with the forum is the result of the Court's analysis of the forum's lack of interest in the litigation. The Court of Appeals did not rest its opinion solely on the fact that the petitioner does not have any contacts with the forum. Rather, the Court of Appeals found that New Hampshire has absolutely no interest in this litigation. A short review of the particular facts of this case will show the reason for the Court's conclusion. The petitioner is a resident of New York and has never resided in New Hampshire. She owns no real or personal property in New Hampshire. Her only contacts with New Hampshire consist of the fact that her name appears in small print in the masthead of three magazines[2] which are distributed in New Hampshire. The lower courts have held that the plaintiff is a stranger to the State of New Hampshire and has no reputation in this State that can be injured:

> "The magazine does not publish her picture and in no way attempts to distinguish her name from that of dozens of other names which appear on the magazine's credits page. Being listed in this litany of unknowns does not make her name a household word here, nor does it create a reputation or image of any kind in New Hampshire. In short, the plaintiff has demonstrated absolutely no connection with the state of New Hampshire. At best the state has only a tenuous generalized interest in the present litigation. Any such interest is shared by the other forty-nine states and the foreign countries where Hustler is circulated." (App. 7a)

As the District Court noted, "the argument that she has acquired a reputation in this State because of the monthly publication of her name in the masthead of *Penthouse* magazine is strained at best." *Id.* No cause of action can be considered to have arisen in New Hampshire if no reputation exists to be injured. Realistically, any injury the petitioner has suffered occurred where she lives and works, which is where this suit should have been brought. Moreover, the petitioner is not convenienced by bringing a suit in New Hampshire. The petitioner admitted

[2] The petitioner's name appeared on the masthead of *Penthouse, Omni* and *Una*. *Una* is no longer marketed.

below that the means of proving her special damages are more readily accessible in New York, the petitioner's domicile. The only reason the petitioner wishes to bring suit in New Hampshire is because she has slept on her rights and has allowed the statute of limitations to expire in every other jurisdiction.

On the other hand, the respondents' contacts with New Hampshire consist merely of sending magazines into that State to be circulated through independent distributors.[5] "Their circulation in New Hampshire amounts to less than one percent of their total circulation in the United States." (App. 13a). The respondents have no offices or space, vehicles, bank accounts, telephones, telephone listings, or a listed address in New Hampshire, and they do not conduct any business in the State. The respondents hold no ownership interest in the wholesalers or retailers who distribute the magazine. All of these factors, which were considered by the Court of Appeals, show the miniscule amount of activity in the forum by the defendants. There is no rationale nexus between New Hampshire, the parties, or the injury. Any injury to the petitioner's reputation occurred outside New Hampshire. More than ninety-nine percent of the allegedly defamatory magazines were circulated outside New Hampshire. The only conceivable interest New Hampshire might have in the present case would be to protect its citizens against reading allegedly defamatory material distributed in New

[5] The petitioner asserts on page 9 of her brief that a certain number of copies of the relevant issues of Hustler were circulated in New Hampshire. Although certain statistics were supplied by the defendant through discovery, the figures used by the petitioner are not part of the record. The petitioner is extrapolating these figures from other figures in the record. Also, the calculations the petitioner performs on page 9 of her brief are not supported by the record. The defendants' answers to interrogatories state the number of copies of the magazine that were shipped to various independent distributors in and near the State of New Hampshire. Some of these distributors apparently service areas both within and without the State. It is impossible to determine the number of copies sold in New Hampshire because the record does not disclose the number of magazines each independent distributor sends into New Hampshire, Vermont or Massachusetts. Furthermore, the petitioner is multiplying the cover price of the magazine by the number of copies sent to the distributor rather than the number of copies actually sold to the public. She also is using the cover price rather than the cost to the distributor, which is 60% of the cover price.

Hampshire about persons not present in New Hampshire. The Court of Appeals recognized that this interest of the forum was too tenuous and generalized to allow the State to exercise jurisdiction over the defendants when nearly all of the activity in the case took place outside of New Hampshire.

As can be seen, the Court of Appeals considered many factors in its decision and did not focus solely and merely on the petitioner's lack of contacts with the forum. The consideration by the Court of the petitioner's lack of contacts with the forum in connection with its analysis of the forum's lack of interest in the litigation is not inconsistent with this Court's teachings and is not in contravention of *Rush v. Savchuk*, 444 U.S. 320 (1980), as the petitioner asserts. The plaintiff in that case was from Minnesota and the defendant was from Indiana. A lawsuit arose out of an accident in Indiana, and the plaintiff sued the defendant in Minnesota under the doctrine of *Seider v. Roth*, 16 NY.2d 111 (1966), by attaching the insurance company's obligation in Minnesota. The defendant had no contacts with the forum, but the forum had a substantial interest in the litigation due to the fact that the plaintiff was a resident of the forum. The language quoted by the petitioner refers to this Court's holding that a forum's strong interests in protecting a plaintiff is not sufficient to allow jurisdiction over a defendant which has no contacts with the forum. This Court in *Rush v. Savchuk id.* did not hold that the forum state's interest in the litigation is not an important factor for purposes of jurisdiction. Rather, the court held that the forum state's interest in the litigation is not by itself sufficient to allow personal jurisdiction where the defendant does not have the requisite minimum contacts with the forum. The language from the opinion quoted by the petitioner is not applicable to this case.

An important principle the Court of Appeals recognizes is that the question of personal jurisdiction must be decided on the particular facts of each case. As stated by this Court: "If a defendant has certain judicially cognizable ties with the state, a variety of factors *relating to the particular cause of action* may be relevant to the determination of whether the exercise of jurisdiction would comport with 'judicial notions of fairplay and substantial justice.'" *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)

(emphasis supplied). Therefore, very little can be gained by comparing the facts of this case to facts of other cases. For instance, the petitioner claims that *Galonis v. National Broadcasting Company*, 498 F.Supp. 789 (D.N.H. 1980), is "jurisdictionally indistinguishable" from the case at hand. However, a review of that case shows that the defendants did not even challenge personal jurisdiction. Moreover, the defendants in that case were significantly engaged in activities in New Hampshire on a continuing basis, including having affiliated radio stations in New Hampshire and sending representatives into the state. Both *Curtis Publishing Co. v. Golino*, 383 F.2d 586 (5th Cir. 1967), and *Gill v. Fairchild Hiller Corp.*, 312 F.Supp. 916 (D.N.H. 1970) involve factual situations where the forum's interest in the litigation was significant due to the fact that the plaintiff was a resident of the forum and the defendant had substantial contacts with the forum.

Accordingly, the Court of Appeals applied the proper legal standards to the particular facts of this case and decided that fairness dictates that the petitioner not be allowed to maintain her action in New Hampshire. The petitioner seasonably could have brought her libel actions in Ohio or New York.[4] However, she chose to allow the statute of limitations to expire in those states and now is asking this Court to allow her to forum shop for a state that is disinterested in her litigation. The petitioner's assertion that the Court of Appeals applied an improper legal standard or focused on the wrong factors in its decision is without merit.

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[4] Petitioner notes on page 15 of her brief that she cannot bring her cause of action for defamation in New York because New York's long-arm statute does not allow service on a non-resident for a defamation action. Petitioner does not deny that she could have brought an invasion of privacy action in New York. By her own admission, she could have recovered substantially the same damages in an invasion of privacy action as in a defamation action. Moreover, although not part of the record in the district court, the corporate defendants were qualified to do business in New York at that time, so they could have been sued in New York. However, New York has a one year statute of limitations for libel, the same time limit as Ohio. Since the petitioner was too late in filing her suit in Ohio, she also slept on her rights in New York. Also, if the petitioner wishes to complain about the long-arm statute in New York, she should direct her request for relief to the New York legislature, which has decided not to protect its own citizens, rather than to the courts of New Hampshire. *Curtis Publishing Co. v. Birdsong*, 360 F.2d 544, 547 n. 5 (5th Cir. 1966).

2. THE DECISION OF THE COURT OF APPEALS IS LIMITED TO THE PARTICULAR FACTS OF THIS CASE AND DOES NOT INVOLVE A QUESTION OF SUCH PUBLIC IMPORTANCE THAT THIS COURT NEEDS TO REVIEW IT.

The petitioner claims that the decisions of the courts below should be reviewed by this Court because those decisions have "far-reaching consequences" for nonresident plaintiffs. The respondents submit that the courts below did nothing more than apply the well-known principles of due process to the particular facts of this case. The decisions below do not have an impact on all nonresident plaintiffs and do not establish any new principles of law. The decision of the Court of Appeals affects only the parties to this action. This case is not one which deserves review by this Court.

The Court of Appeals recognized that it was not establishing a new legal standard and that nonresident plaintiffs are not barred, as a general rule, from suing nonresident defendants:

> "While we accept this case as support, we do not decide that an out-of-state plaintiff can never sue an out-of-state publisher for damage inflicted when his publication is sent into the forum state. Rather, considering this case on the individual facts alleged in the complaint, *cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 386 (1980), we decide here only that the New Hampshire tail is too small to wag so large an out-of-state dog." *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 36 (1982).

This statement by the Court of Appeals conforms with the recognized principle that jurisdiction is to be decided on the "factors relating to the particular cause of action. . . " *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). One need only to review the cases involving libel to see that each case stands on its own facts. *See e.g. Church of Scientology of California v. Adams*, 584 F.2d 893 (9th Cir. 1978); *Anselmi v. Denver Post, Inc.*, 552 F.2d 316 (10th Cir.), *cert. denied sub nom. Times Mirror Co. v. Anselmi*, 432 U.S. 911 (1977); *Curtis Publishing Co. v. Golino*, 383 F.2d 586 (5th Cir. 1967); *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966); *David v.*

National Lampoon, 432 F.Supp. 1097 (D.S.C. 1977); *Roy v. North American Newspaper Alliance, Inc.*, 106 N.H. 92, 205 A.2d 844 (1964). Some of the courts in these cases found that the forum had jurisdiction over the defendants, while others held that the forum could not assert jurisdiction over the defendants. Each case turns on the particular facts of the cause of action.

The petitioner asserts that the effect of the decision below is to require a libel plaintiff to bring suit in either the state of his residence or the publisher's state. To the contrary, the decision of the Court of Appeals, which follows the legal principles established by this Court, merely requires a libel plaintiff to bring suit in a state where it is reasonable to do so as a result of "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186 (1977). Normally, a libel plaintiff would have a choice of several jurisdictions. For example, the petitioner in this case at least could have brought suit in Ohio or New York. In fact, the petitioner knew that Ohio was an appropriate forum, but she filed suit there too late. She now is seeking to bring suit in New Hampshire merely to circumvent the statute of limitations problem she created herself by allowing the statutes to expire in the appropriate forums. The allowance of this case in New Hampshire would be an open invitation to allegedly defamed plaintiffs to bring their stale claims to New Hampshire. As the Court said in *Seymour v. Parke, Davis & Co.*, 294 F.Supp. 1257, 1260 (D.N.H. 1969), *aff'd* 423 F.2d 584 (1st Cir. 1980), the allowance of a suit "merely to circumvent an unfavorable statute of limitations would inevitably lead to a thorough and complete perversion of fundamental principles of diversity jurisdiction, comity and fairness, a result as illogical as it is unreasonable, and totally lacking in fairness."

Accordingly, this case is not appropriate for review by this Court. The Court of Appeals applied the proper legal standard to a particularized set of facts and concluded that the forum lacked jurisdiction over the respondents. The Court's opinion has no effect on other libel plaintiffs, and the Court so recognized. This case does not present a question of great public importance.

CONCLUSION

The respondents respectively submit that the petitioner has failed to sustain her burden of establishing under Rule 17 that there are special and important reasons why the writ should be granted. The decision below did not apply an incorrect legal standard, but rather the Court of Appeals applied the correct legal standard to the particular facts of this case. The decision does not involve a question of federal law of great public importance which should be settled by this Court. For these reasons the respondents request that the petition for writ of certiorari be denied.

Respectfully submitted,

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